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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.....

EMIL ORTMAN, as Special Administrator of the Estate of Donna Jean Ortman, Deceased,

Petitioner,

vs.

CLIFFORD S. SMITH AND JUDITH SMITH, by CLIFFORD S. SMITH, her Guardian ad Litem,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

EMIL ORTMAN, as Special Administrator of the above deceased, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered July 17, 1952 (R. 51), affirming the judgment of the District Court of the United States for the District of South Dakota, entered December 13, 1951 (R. 7).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, and Section 1254 of the Judicial Code (Act of June 25, 1948, Chapter 646, 62 Stat. 928, 28 U. S. C. A. 1254).

OPINION BELOW

The opinion of the Court of Appeals affirming the judgment of the District Court entered December 13, 1951 (R 7) was filed on July 17, 1952 (R. 51) and has not been printed in the Federal Reporter.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes are printed in the Appendix, infra.

QUESTIONS PRESENTED

1. Whether the court of Appeals erred in sustaining the trial court in holding that the defendant, Charles Smith's conduct was not the proximate cause of the death of the 13 year old guest, Donna Jean Olson, although said defendant in wilful violation of the statute and without being present permitted his minor daughter—12 years old—to drive his automobile upon the public highways in a reckless manner, and as a result of such operation her negligence precipitated the accident that killed the name occupant.

2. Whether the said courts erred in construing the "guest statute" as applicable to the absent car owner, particularly where the driver thereof, as herein, is not fifteen years of age and wilfully operating the automobile in direct violation of the state law.

3. If the guest statute applies to an absent owner is it unconstitutional and contrary to Article 14 of the U. S. Constitution?

SUMMARY AND STATEMENT OF THE MATTER INVOLVED

This is an action for damages pursuant to the "Wrongful Death Statute" (See Appendix). Donna Ortman, 13, was killed as a result of an accident while riding as a guest with seven others in an automobile owned by the respondent, Clifford S. Smith, and operated by his 12 year old daughter. The father was not present, and contrary to the statute (See Appendix) wilfully permitted his underage daughter to drive his car. The daughter's negligence, while driving such car, precipitated the accident and fatal injury to the deceased.

At the time of the fatal accident the said 12 year old driver was (1) negotiating 45 miles an hour (R. 25), (2) on a road of loose gravel (R. 38), (3) when she suddenly applied the brakes (R. 38), (4) the car swerved (R. 29) and she lost control after which she drove 175 feet from the "gouge" marks R. 19) and in the ditch where it overturned killing petitioner's daughter. Petitioner, the father of the deceased, contends that the defendant, Clifford S. Smith's negligence per se or wilful misconduct, as aforesaid, was the proximate cause of the accident. Smith admitted knowingly permitting his daughter to operate his automobile. She was prohibited by law from doing so unless he accompanied her.

The trial court directed a verdict predicated upon the grounds that such negligence of the defendant, Clifford S. Smith, was not the proximate cause of such guest's death; and that the "guest statute" in South Dakota is to be applied to the absent owner; and that such defendant was not guilty of "wilful misconduct." The appellate court sustained these views and construction and in its opinion stated that other states have considered the problem and have uniformly so held—that is, an absent owner may avail himself of the "guest" statute. The age of the minor was not considered by the court.

The lower court's directed verdict was affirmed on appeal.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals for the 8th Circuit erred as follows:

I. In affirming the judgment of the United States District Court for the District of South Dakota.

II. In rendering a decision in conflict with the decision of the U. S. 6th Circuit Court of Appeals on the same matter.

III. In sanctioning the trial court's departure from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision based upon the lower court's clearly erroneous misconstruction and misapprehension of the law.

IV. In deciding an important question of local law in a way probably in conflict with applicable local decisions.

REASONS FOR GRANTING WRIT

I. The 8th Circuit Court of Appeals erred in rendering a decision in conflict with the decision of the 6th Circuit Court of Appeals on the same matter. The question herein had heretofore been decided in *Coop vs. Williamson, et al.* (6th C. C. A.), 173 F. (2d) 313 (C. C. 183 F. (2d) 572). That case expressly sustains the petitioner's contentions. In the above case the defendant auto owner, with actual knowledge of the defective motor vehicle and in violation of the law, permitted it to be driven by another on the highways. The operator was a stranger to the owner. There was an accident and the injured, brought suit against the absent owner, who was held liable because he was guilty of negligence, per se—allowing his car to be operated in violation of law. The owner's conduct was the proximate cause of the accident. The driver was absolved of negligence.

II. The Court of Appeals overlooked one of its prior decisions—*Atchison R. R. vs. Reesman* (8th C. C. A.), 60 F. 370. In that case the railroad violated the statute in that it failed to have adequate fences to keep out livestock. An employee sustained an injury as a result thereof, and this Circuit Court held that the statutory violation was the proximate cause of the injury and upheld recovery.

III. The Court of Appeals overlooked decisions of this court in which it has been held that a statutory violation may be considered as evidence of negligence to be weighed by the jury with the other facts in the case. See *O'Donnell, Adm. vs. Elgin, etc., Ry.*, 338 U. S. 384, 38 L. Ed. 187.

BRIEF IN SUPPORT OF PETITION

I.

The decision of the 8th Circuit Court of Appeals is in conflict with the decision of the 6th Circuit Court of Appeals.

1. In *Coop, et al. vs. Williamson, et al.* (6th C. C. A.), 173 F. (2d) 313 (P. 315) that court said: "While automobiles * * * are not per se dangerous instrumentalities, they may become so when used * * * in a manner calculated to do injury. Hence the rule that one who lets an automobile * * * for use in public owes the duty of exercising ordinary care to

avoid putting forth a machine with defects calculated to injure persons who come in contact with it. * * * the statute had been violated, and this violation * * * constitutes negligence per se. * * * The statute was enacted to protect the public." The verdict for the plaintiff was upheld.

The principle of law promulgated in *Coop, et al. vs. Williamson, et al.,* supra, is aptly stressed in *Williams vs. Husted,* 39 Ohio I. Abs. 589, 54 N. E. (2d) 165, and *Dyreson vs. Hughes, et al.,* 333 Ill. App. 198, 76 N. E. (2d) 809. In *Williamson vs. Husted,* supra, the automobile owner permitted her under age (less than 14 years old) crippled granddaughter to operate her car. The plaintiff—an infant—at the invitation of such operator, was a guest in the car. The guest was injured as a result of an accident while such car was operated by said driver. The appellate court of Ohio held that the absent owner was liable because she had converted an automobile into a dangerous instrumentality by knowingly placing it in the custody and control of the minor and that the "guest" statute did not apply.

In *Dyreson vs. Hughes,* supra, the auto owner with actual knowledge of the defective automobile, loaned it to the driver who took a guest for a ride. The guest sustained an injury as a result thereof, and the appellate court held that the owner, although absent, was liable therefor, citing and following *Williamson vs. Husted,* supra.

2. The defendant Clifford S. Smith's wrong was the proximate cause of the death of the deceased herein despite the intervention of Judith Smith—the 12 year old minor. The guest statute is not applicable. Contrary to the decision of the appellate (8th) court the only authority covering the precise point is *Bisoni vs. Carlson, et al.,* 171 Kan. 631, 237 Pac. (2d) 404. The driver therein was under age and expressly prohibited by statute from operating an auto. He had an accident and the guest filed suit against the owner. The court held that the "guest" statute did not apply to the absent owner.

II.

The Court of Appeals erred in the application of proximate cause.

O'Donnell, Adm. vs. Elgin, etc., R. R., supra. "Breach of

certain statutes in various jurisdictions will be regarded as some evidence of negligence, to be weighed by the jury with the facts."

Fairport, etc., R. R. vs. Meredith, 290 U. S. 589, 78 L. Ed. 1446.

Atchinson R. R. vs. Reesman, supra.

Delaware R. R. vs. Ketz (3 C. C. A.), 233 F. 31.

Railroad Company vs. Calhoun, 213 U. S. 7, 29 S. Ct. 321, 53 L. Ed. 671. This court in the above case said: "One is held responsible for all the consequences of his act which are natural and probable and ought to have been foreseen by a reasonably prudent person."

McLeod vs. Tri-State, etc., 71 S. D. 362, 24 N. W. (2d) 485.

Hayes vs. Michigan Central R. R., 111 U. S. 410, 415. In this case the Railroad failed to erect a fence for the purpose of protecting against injury to persons as required by the ordinance of the city. This court held that as a result thereof an action for damages may be maintained against the railroad if it were established that the accident was reasonably connected with the foresaid omission, saying:

> "The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery. * * *
>
> "The question is, was it causa sine qua non; a cause which, if it had not existed, the injury would not have taken place, an occasional cause, and that is a question of fact, unless the casual connection is evidently not proximate."

The facts presented a jury question. *Brinegar vs. Green* (8th C. C. A.), 117 F. (2d) 316; *Bizzaro vs. Payne* (4th C. C. A.), 169 F. (2d) 851.

Neither the lower court nor the Circuit Court has sought to differentiate the principle or rule of law involved in the premises, namely: (1) If the "absent" car owner is liable for damages caused by a wilful statutory violation as expounded in *Coop, et al. vs. Williamson, et al.,* supra,—putting forth a machine with defects calculated to injure others, and thus

producing a dangerous instrumentality, then it should also follow, (2) such owner is likewise liable when he makes a wrongful commitment of his auto to an underage child—less than 15 years old—in wilful violation of the law of South Dakota. In either case the wilful violation of the statute is the proximate cause of the accident. The situation may be likened to the hardware merchant who was held liable for damages when he wilfully sold firearms to one prohibited by law from possessing same and injury resulted. See *Anderson vs. Settergren*, 100 Minn. 294, 111 N. W. 279.

III.

This court will assume jurisdiction to review an arbitrary construction when the lower court is clearly wrong.

Yu Cong Eng vs. Trinidad, 48 S. Ct. 618, 271 U. S. 500, 70 L. Ed. 1059.

Southern Pacific, etc., vs. U. S., 285 U. S. 240, 76 L. Ed. 736.

Thompson vs. Consolidated, et al., 300 U. S. 55, 81 L. Ed. 510 (P. 521). The following excerpt appears: "But, being under duty to make an independent study of the question, we have done so."

CONCLUSION

The guest statute does not supersede S. D. 37.1701. The latter statute expressly authorizes recovery against the defendant car owner based upon the grounds that the petitioner has suffered a detriment because of the former's unlawful act. If respondent car owner may escape liability then the age of his daughter is immaterial, even if she were eight years old. The "guest" statute, if applicable, is unconstitutional and violates the due process of law clause; and it prevents petitioner from recovering for the injury, in derogation of the South Dakota constitutional provision as set forth in the Appendix.

WHEREFORE, your petitioner prays for a writ of certiorari to review the judgment of said Circuit Court.

Dated this 25th day of August, 1952.

Respectfully submitted,
T. R. JOHNSON and
TOM KIRBY,
Attorneys for Petitioner.

APPENDIX

Guest Statute

Sec. 44.0362 South Dakota Code of 1939 reads as follows:

"No person transported by the owner or operator of a motor vehicle as his guest without compensation for such transportation shall have cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been caused by the willful and wanton misconduct of the owner or operator of such motor vehicle, and unless such willful and wanton misconduct contributed to the injury, death, or loss for which the action is brought; and no person so transported shall have such cause of action if he has willfully or by want of ordinary care brought the injury upon himself."

Statute for Damages

Section 37.1701 South Dakota Code of 1939:

"Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages. Detriment is a loss or harm suffered in person or property."

Drivers' Statute

Section 44.0329 South Dakota Code of 1939 reads:

"* * * no person shall operate or drive a motor vehicle who is under fifteen years of age, unless such person is accompanied by the owner of the motor vehicle being operated."

Wrongful Death Statute

Chapter 173, 1947 Session Laws of South Dakota contains the following excerpt: (Amends Chap. 37.22):

"Every such action shall be for the exclusive benefit of the wife or husband and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; * * *."

South Dakota Constitution

Section 20, Article VI of the Constitution of South Dakota:

"All courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay."

Penalty

Section 44.9906 South Dakota Code 1939 provides a penalty—a fine for violating Section 44.0329.

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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 324

EMIL ORTMAN, as Special Administrator of the Estate of Donna Jean Ortman, Deceased,

Petitioner,

vs.

CLIFFORD S. SMITH AND JUDITH SMITH, by CLIFFORD S. SMITH, her Guardian ad Litem,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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COMMERCIAL PRINTING COMPANY — SIOUX FALLS, SOUTH DAKOTA

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Consolidated and restated it appears that petitioner's arguments for review by this Court are:

1. The decision of the Eighth Circuit Court of Appeals is in conflict with a decision of the Sixth Circuit Court of Appeals on the same matter.

2. There was error in the construction of the South Dakota Guest Statute.

3. The South Dakota Guest Statute, as construed by the Trial and Appeal Courts, is unconstitutional.

These arguments will be considered in the order stated.

ALLEGED CONFLICT IN DECISIONS

In this argument Petitioner seeks the benefit of one of the reasons for review suggested by this Court in its Rule 38. It is not applicable inasmuch as the case at bar involves the construction of a state statute demanding application of local law. *Erie R. Co. vs. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. To the extent that the State Courts have differed in their interpretations of guest statutes we may expect conflict in the decisions of the Circuit Courts of Appeal when called upon to construe them. Certainly the suggested reason for review adopted by Petitioner was not intended by this Court to overrule the doctrine established in the *Erie* case.

Moreover, the conflict urged by Petitioner does not exist. He cites the case of *Coop., et al. vs. Williamson, et al.*, 6th CCA, 173 F. (2d) 313. That decision applied the general rule of liability for negligent entrustment where the duty owed was that of ordinary care. The case did not involve a guest statute and could not, under any circumstances, serve as a precedent for the Eighth Circuit Court of Appeals in the case at bar.

ALLEGED ERROR IN CONSTRUCTION OF SOUTH DAKOTA GUEST STATUTE

In holding that the South Dakota Guest Statute applied to the absent owner of the vehicle involved, the Circuit Court of Appeals was governed by the express wording of the statute (set forth in Petitioner's brief) and the construction adopted by an overwhelming weight of authority. *Benton vs. Sloss*, ...Calif....., 234 P. (2d) 749, *Posey vs. Krogh*, 65 N. D. 490, 259 N. W. 757; *Cunningham vs. Bell*, 149 Ohio Statutes 103, 77 N. E. (2d) 918; *Randall vs. Stager*, 355 Pa. 352, 49 A. (2d) 689; *Hawkins vs. Sydnor*, 170 Va. 267, 196 S. E. 619.

We have found only two decisions in conflict with this construction. *Williams vs. Husted*, 39 Ohio I. ABS. 589, 54 N. E. (2d) 165 and *Bisoni vs. Carlson, et al.*, 171 Kansas 631, 237 P. (2d) 404. In neither case does the Court involved sup-

port its departure from the general rule by acceptable authority and the *Williams* case was decided by an intermediate appeal court in Ohio prior to the decision of the highest appellate court of that state in *Cunningham vs. Bell,* supra, which, in unequivocal language, adopted the general rule.

This question has not been before the Supreme Court of the State of South Dakota. However, the South Dakota Guest Statute was taken from Michigan law and is construed in accordance with the decisions of the Supreme Court of Michigan announced as of the date of its adoption. *Melby vs. Anderson,* 64 S. D. 249, 266 N. W. 135. Prior to this adoption, the Michigan Court had decided that the protection afforded by the guest statute should be extended to a non-driving owner. *Naudzius vs. Lahr,* 253 Mich. 216, 234 N. W. 581. Therefore, even if there had been a recognizable conflict in decisions among the various courts on the question involved, the Eighth Circuit Court of Appeals was required to follow the rule announced by the Michigan Court. *Huffman vs. Buckingham Transportation Company of Colorado, Inc.,* 10th Cir., 98 F. (2d) 916 unless such construction indicated a clear misapprehension of the law.

Petitioner objects to the holding of the trial and appeal courts that in the absence of a finding of wilful and wanton misconduct on the part of the driver of the vehicle, there could be no owner liability because his acts, no matter how classified, could not be considered the proximate cause of the damage suffered. In adopting this construction the Courts followed the interpretation of the statute by the Michigan Court in *Naudzius vs. Lahr,* supra. Again, this question had not been before the South Dakota Court and the Michigan construction was controlling. *Melby vs. Anderson,* supra.

However the Court of Appeals found as a matter of law that there were no acts of the driver or owner constituting wilful and wanton misconduct as those terms have been defined by the Supreme Court of the State of South Dakota (R. 51-57). These findings were decisive of the case and standing alone required that the decision of the trial court be affirmed. Significantly, in the argument now presented by Petitioner,

there is no attempt by reason or authority to prove error in these holdings. Conceding that the Courts below were in error in applying the "proximate cause" rule (and we submit they were not), it is established that if the decisions below are correct although not premised on proper grounds, they will be upheld. *Helvering vs. Gowran,* 302 U. S. 238, 58 S. Ct. 154, 82 L. Ed. 224 and cases cited therein.

ALLEGED UNCONSTITUTIONALITY OF GUEST STATUTE AS CONSTRUED

The argument that the South Dakota Guest Statute as construed by the trial and appeal courts contravenes the "due process" clauses of the State and Federal Constitutions was initially raised by Petitioner in his application for rehearing before the Court of Appeals (R. 61, 62). That issue was not raised in the pleadings (R. 2-5). Indeed, Petitioner's complaint proceeded on the theory that the owner of a vehicle was protected by the guest statute and he may not now be heard to argue that the statute as so construed is unconstitutional. *United States vs. Nudleman, et al.* (CCA 7), 104 F. (2d) 549, certiorari denied 308 U. S. 589, 60 S. Ct. 115. *Clarke vs. Storchak,* 348 Ill. 564, 52 N. E. (2d) 229, appeal dismissed 64 S. Ct. 1269, 322 U. S. 713, 88 L. Ed. 1555.

However the constitutionality of guest statutes has heretofore been upheld by this court in *Silver vs. Silver,* 280 U. S. 117, 50 S. Ct. 57, 74 L. Ed. 221 and by the various state courts in *Silver vs. Silver,* 108 Conn. 371, 143 A. 240; *Hazzard vs. Alexander,* 36 Del. 212, 173 A. 517; *Naudzius vs. Lahr,* 253 Mich. 216, 234 N. W. 581 (on facts involving a nondriving owner); *Perozzi vs. Ganiere,* 149 Ore. 330, 40 P. (2d) 1009; *Sorrell vs. White,* 103 Vermont 277, 153 A. 359; *Shea vs. Olson,* 185 Wash. 143, 53 P. (2d) 615. It is the holding of all of these decisions that legislation in the field involved is within the police powers of the states. And while it may be argued that with the exception of the Michigan decision in *Naudzius vs. Lahr,* supra, the cases did not involve the extension of the protection of the statutes to nondriving owners, certainly the question of constitutionality revolves around the power in the state governments to set up a different

standard of care in guest situations. If that power exists to the protection of the driver of a vehicle, there can be no reason why it should not also exist to the protection of the absent or nondriving owner.

There was no error in the decisions of the courts below. The application for review by this Court should be denied.

Respectfully submitted,

M. T. WOODS and
F. M. SMITH,

Sioux Falls, South Dakota,

Attorneys for Respondents.